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Supreme Court of the United States

OCTOBER TERM 1929.

No. 423

RUFFIN COLLIE, CLINTON COOK AND ROBBIE ROWE, PETITIONERS,

versus

THOMAS D. FERGUSSON; F. W. DARLING AND J. S. DARLING, TRADING AS J. S. DARLING & SON; S. M. SINCLAIR; W. J. WILLIAMSON; J. C. COUNCIL; NYE, THE ENGINE MAN, INCORPORATED; E. T. LAWSON AND I. E. LAWSON, TRADING AS E. T. LAWSON & SON; L. JOHNSON AND H. L. CORKRAN, TRADING AS JOHNSON & CORKRAN, AND J. V. BICKFORD, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR F. W. DARLING and J. S. DARLING, trading as J. S. DARLING & SON; S. M. SINCLAIR; E. T. LAWSON and I. E. LAWSON, trading as E. T. LAWSON & SON, W. J. WILLIAMSON, trading as WILLIAMSON'S, J. C. COUNCIL, and L. JOHNSON and H. L. CORKRAN, partners trading as JOHNSON AND CORKRAN.

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R. ARTHUR JETT,
WALTER SIBERT,
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Proctor for Respondent.

W. T. BARRON & CO., INC., NORFOLK, VA.

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I. OPINIONS BELOW

The opinion of the Circuit Court of Appeals is reported in 31 Fed. (2d.), 1010. The District Court for the Eastern District of Virginia did not render a written opinion, but its conclusions are contained in the Court's decree found at pages 58, et seq. of the record.

II. JURISDICTION OF THIS COURT.

The Circuit Court of Appeals having affirmed the District Court and denied a rehearing, the decree sought to be reviewed is the decree of the Circuit Court of Appeals, entered on July 1st, 1929, and found upon page 79 of the record.

III. THE PARTIES HERE PRESENTED.

An appearance has been made and this brief is filed on the part of F. W. Darling and J. S. Darling, trading as J. S. Darling & Son, the original libellants and the other intervening libellants and petitioners named at the beginning of this brief, and there is no appearance in this Court nor was there an appearance in the Circuit Court of Appeals on behalf of Thomas D. Fergusson, the owner and master of the fishing vessel "DOLA LAWSON".

IV. QUESTIONS PRESENTED.

The questions presented, so far as these respondents are concerned, are (1) whether or not Section 596 Title 46, United States Code, providing that every master or owner who refuses or neglects, without sufficient cause, to pay to every seaman on any vessel making coasting voyages a sum equal to two days' pay for each and every day during which payment is delayed beyond a period of two days after the termination of the agreement under which the seaman was shipped or at the time such seaman is discharged, applies to fishing vessels such as the "DOLA LAWSON"; and (2) where the master or owner has no interest in the proceeds of sale of the vessel in the registry of the Court, whether or not the burden of the penalties provided by Section 596 shall be transferred from the master and owner to the lien holders who have intervened along with the seaman and the amount set aside for the payment of their claims used for the payment of such penalties.

The other points raised by the petitioners in their application for a writ of certiorari deal with(a) damages for breach of the seamen's contract for hire, (b) the propriety of the District Court in suspending the operation of its decree of distribution, and (c) an alleged conflict, as construed by counsel for the petitioners in the findings of the

Circuit Court of Appeals, are all matters within the province of the particular court ruling upon the same and are not such matters as demand a review by this Court. Where it is evident that a correct result has been reached, questions concerning the correctness of particular rulings not affecting such results are immaterial. *Carlisle Packing Company v. Sandanger*, 259 *U. S.*, 255; *Sun Company v. Vinton Petroleum Company*, 248 *Fed.*, 623, *certiorari denied*, 247 *U. S.*, 514; *Dimmit v. Breakley*, 267 *Fed.*, 792, *certiorari denied* 254 *U. S.*, 641.

V. FACTS AND PROCEEDINGS BELOW

The "DOLA LAWSON" was a small fishing trawler of 24 gross and 15 net tons, and at the time she was libeled was owned by Thomas D. Fergusson, Hampton, Virginia.

The original libel was filed on May 14th, 1928, by Darling & Son for repairs, supplies and other necessaries furnished the vessel, amounting to the sum of $543.07, for which a maritime lien was claimed. (R. 2) On May 16th, 1928, the intervening petition of Ruffin Collie and Clinton Cook was filed. Collie claimed he was employed by the owner of the said vessel on January 15th, 1928, as cook, at wages of $100.00 per month, and that there was due him the sum of $375.00 straight wages and $20.00 over time, and up to the time of the filing of his petition he had received from the owner of the vessel on account of his wages the sum of only $25.00. Clinton Cook claimed he was employed on January 1st, 1928, as deckhand and oiler at wages of $80.00 per month and that at the time his petition was filed there was $360.00 due him as straight wages and $20.00 for over time, making a total of $380.00, and during the entire period of his employment he had not been paid anything on account of wages. (R. 3).

Robbie Rowe filed his intervening petition on June 23rd, 1928. He claimed he was employed on September 1st, 1927, as seaman at the rate of $25.00 per week, and that there was due him for a period of six weeks from that date the sum of $150.00, upon which there had been a payment made him by the owner of $5.00, leaving a balance due of $145.00. (R.17). His employment on said vessel had, therefore, terminated about seven months before the original libel was filed. In addition to their wages, Collie, Cook

and Rowe each claimed, under Section 4529 R. S. U. S. (Sec. 596, Title 46, U. S. C.), two days' pay for each day their wages were withheld from them without sufficient cause.

Intervening libels and petitions were filed on May 16th, 1928, by respondent, S. M. Sinclair, for repairs, supplies and other necessaries amounting to $355.49 (R. 7); by E. T. Lawson & Son on May 21st, 1928, for repairs, supplies and other necessaries furnished said vessel amounting to the sum of $687.36 (R. 8); by respondent, W. J. Williamson, trading as Williamson's, on May 24th, 1928, for repairs, supplies and other necessaries furnished the vessel amounting to the sum of $30.41 (R. 10); by respondent, J. C. Council, on May 24th, 1928, for repairs, supplies and other necessaries furnished said vessel amounting to the sum of $90.35 (R. 11); by respondents, Johnson and Corkran, on May 25th, 1928, for repairs furnished said vessel amounting to the sum of $423.50 (R. 13); by respondent, J. V. Bickford, on May 29th, 1928, for repairs furnished said vessel amounting to $42.25 (R. 15); and by respondent, Nye, The Engine Man, Incorporated, on June 8th, 1928, for repairs, supplies and other necessaries furnished said vessel amounting to $380.27 (R. 15).

VI. THE FINDINGS OF THE DISTRICT COURT

The vessel was sold at Marshal's sale for the sum of $1,650.00. The court costs amounted to the sum of $224.26. The District Court allowed the full wages claimed by Collie, which with interest amounted to the sum of $402.57; the full wages claimed by Cook, which with interest amounted to the sum of $388.00; and the full wages claimed by Rowe, which with interest amounted to the sum of $151.00, but refused to allow either of said petitioners penalties under Section 596 Title 46, United States Code. The remainder of said fund amounting to $474.17 was apportioned among the libellants and intervenors who had furnished repairs, materials and supplies to the vessel in the aggregate sum of $2,867.07. (R. 58).

VII. THE FINDINGS OF THE CIRCUIT COURT OF APPEALS.

An appeal having been taken by the petitioners, the Circuit Court of Appeals affirmed the District Court, but

allowed interest for the time during which the amounts due the petitioners had been withheld from them incident to the appeal. (R. 74).

VIII. ARGUMENT.

Section 596, Title 46, United States Code, under which penalties are claimed in this case, does not apply to fishing or whaling vessels or yachts, and therefore does not apply to fishing vessel "DOLA LAWSON". Section 596 was originally Section 4529 U. S. R. S., which was amended by Section 4 of the Act of December 21st, 1898, Chap. 28, 30th Stat., 756. Section 26 of this Act is as follows:

> "That this act shall take effect sixty days after its approval and shall apply to all vessels not herein specifically exempted but Sections one, two, three, four, five, six, seven, eight, nine, ten, eleven, thirteen, fourteen, fifteen, twenty-three and twenty-four, shall not apply to fishing or whaling vessels or yachts."

Section 4529 was again amended by the Act of March 4th, 1915, 38 Stat., 1164, in substantially the same language except that it provided for the payment of a sum equal to two days' pay for each day during which payment was delayed, while the Act of December 21st, 1898 provided for one day's pay. It is clear that the Act of 1915 in no way repealed Section 26 of the Act of 1898, and that the same is still in force, and that Section 596 dealing with penalties does not apply to fishing or whaling vessels or yachts. Section 4 of the Act of June 28, 1906, 34 Stat., 551, as originally enacted, provided that Sections 4, 6 and 24 of Chap. 28 of the Acts of Congress, approved December 21st, 1898, shall apply to all vessels engaged in the taking of oysters, anything in Section 26 of said last mentioned act to the contrary notwithstanding. This act now appears in the United States Code as Section 598, Title 46, and is as follows:

> "Sections 596, 599 and 604 shall apply to all vessels engaged in the taking of oysters."

If the Act of March 4th, 1915, repealed Section 26 of the Act of December 21st, 1898, and as a result thereof made Section 4529 U. S. R. S., applicable to all coasting

vessels regardless of their character, then it also repealed Section 4 of the Act of June 28th, 1906, and Section 598, Title 46, United States Code, making vessels engaged in taking oysters subject to said Section 4529 U. S. R. S., now Section 596, Title 46, U. S. C., is entirely superfluous and has no place in the United States Code.

This view is clearly the opinion of the Department of Commerce, Bureau of Navigation, as we find this note in Supplement 3 to the Official Edition of the United States Code, p. 449, under Section 596, Title 46:

> "The Commissioner of Navigation, commenting on this section says: 'The statement this section shall not apply to fishing or whaling vessels or yachts, but shall apply to all vessels engaged in the taking of oysters, should appear in Section 596.'"

We have found no judicial determination of the point. If the administrative view of the law as it now exists is correct, and we submit there is every reason to believe that it is, then these petitioners are not entitled to penalties or extra wages for the delay incident to the sale of the vessel and adjudication of the questions by the lower courts. We do not think it is necessary to cite authorities to the effect that a penalty statute such as Section 596 must be strictly construed.

IX. SEAMEN NOT ENTITLED TO PENALTIES AS AGAINST CLAIMS OF OTHER MARITIME LIENORS.

Even should this court determine that Section 596 applies to fishing vessels, we submit that under the circumstances of this case the seamen are not entitled to payment of penalties from the proceeds of sale as against the claims of other maritime lienors. As to whether or not they are entitled under the circumstances to a personal decree against the master and owner of the vessel for such penalties, these respondents are not concerned.

In any event we do not think Robbie Rowe is entitled to penalties or waiting time. The facts show that he waited months after his employment ended, all the time himself a resident of the Port of Hampton, which was the home port of the vessel, and the base of her operations, to make his

demand. The employment of Collie and Cook was a verbal contract for no specific time. They were not under shipping articles and under the decision of the Circuit Court of Appeals for the Fourth Circuit in the *Pokanoket*, 156 *Fed.*, 241, it was nothing more nor less than a hiring at will which could have been terminated by either party at any time. Their employment was terminated by the seizure of the vessel under admiralty process for the purpose of converting her into cash to pay the liens against her. Both Collie and Cook intervened and made themselves parties to these proceedings. We do not see how they can well take advantage, so far as other lien claimants are concerned, of the delay incident to selling the seized property and the adjudication of the amount and rank of the claims principally the wage priorities claimed by them therein.

We find the following district court decisions dealing with the precise point.

In the case of *The Moshula*, 276 *Fed.*, 35, the court says at page 36:

> "In the present case neither the master nor the owner has any interest in the fund now in the registry of the court resulting from the sale of the vessel. To allow the penalties would be to transfer the burden thereof from the master and owner to the lien holders and the mortgagee. This I do not believe was ever contemplated or intended by Congress in enacting the statute in question."

And in the case of *The Acropolis*, 8 *Fed.*, (2*d.*), 110, Judge Campbell, of the District Court for the Eastern District of New York says at page 110:

> "It thus appears that the intent of the statute is to punish the refusal or neglect of the master or owner, and is personal to them; therefore subsequent lienors should not have the fund to which they must look for payment depleted to pay a penalty which, if even properly allowable, should be paid by the master or owner."

See also the President Arthur, 25 Fed. (2d.), 1002.

X. CONCLUSION.

The petitioners have been allowed the full amount of wages earned by them with interest, and we think they have received full justice in this case. We submit that even if the statute providing for penalties is applicable to fishing vessels, that to deplete the small remainder of the fund alloted to the payment of lien claims for repairs, supplies and other necessaries furnished the vessel, would place upon such lienors a harsh and unjust burden. We respectfully request that the decree of the Circuit Court of Appeals be in all respects affirmed.

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